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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 97

RALPH PICCIRILLO,

Petitioner,

v.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

October Term, 1970

RALPH PICCIRILLO,

Petitioner,

v.

NEW YORK,

Respondent.

BRIEF FOR RESPONDENT

Statement

This proceeding arises from the granting of a Writ of Certiorari to the Court of Appeals of the State of New York. The majority and dissenting opinions are re-printed at pages 113-123 of the Appendix and are reported at 24 N.Y. 2d 598. The majority and minority opinions of the Appellate Division of the Supreme Court of the State of New York appear at pages 107-112 of the Appendix and are reported at 30 A.D. 2d 664. The opinion of the Supreme Court of the State of New York, County of Kings, was not officially reported and appears in the Appendix at pages 65-66.

The petitioner, along with a co-defendant, Anthony LaBello, was convicted by a judgment of the Supreme Court of the State of New York, rendered January 19, 1966, upon

a plea of guilty entered during trial, of the crime of Attempted Bribery as a Felony, and was sentenced to 1½ to 3 years in prison. The sentence was to begin after the expiration of a previous sentence for Attempted Assault in the Second Degree of from 1 year 3 months to 2½ years which had been rendered on January 11, 1965.

Jurisdiction

The judgment of the New York Court of Appeals was entered April 24, 1969 (R.111).* The petition for a writ of certiorari was filed July 19, 1969 and certiorari was granted February 27, 1970. The jurisdiction of the Court is invoke pursuant to Title 28 of the United States Code, Section 1257(3).

Questions Presented

Appellant contends that his indictment by the same grand jury before which he was compelled to testify violated his privilege of self incrimination, that he was indicted for a crime concerning which he was required to testify after having been granted immunity and that the denial of his request to speak to his attorney while in the Grand Jury violated his rights.

Respondent answers that the crime for which appellant was indicted was not covered by the scope of the immunity afforded him, that sufficient evidence other than his compelled testimony supported the indictment, his testimony was not used against him and that even if his rights were technically violated by denying his request to see counsel, the error was not prejudicial and was harmless because none of his answers supported the indictment.

*References prefaced with the letter "R" are to the separate Appendix filed pursuant to Rule 36.

The Constitutional and Statutory Provisions Involved

United States Constitution, Amendments V, VI and XIV, Section 1.

New York Penal Law of 1909, Section 2447 (applicable to offenses committed prior to September 1, 1967).

1. "In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

NEW YORK CODE OF CRIMINAL PROCEDURE, Section 619-c (applicable to offenses committed after September 1, 1967):

1. In any investigation or proceeding where, by express provision of section six hundred nineteen-d of this chapter or any other statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall no be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence; and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

Facts

On March 19, 1964, petitioner and a co-defendant, Anthony Labello, were arrested for assaulting one Jack Graham at a housing project in Brooklyn, apparently with tire irons. The beating was believed to be at the direction of others, who paid Labello and Piccirillo. The investigation which later ensued resulted in various indictments secured by the New York County District Attorney involving a "painting scandal" in connection with property maintained by the New York Housing Authority (R-101-104).

On March 20, 1964, the day after the arrest, petitioner attempted to bribe Patrolman William A. Sewell, the Housing Authority Officer, who had seen the crime and had arrested the two men for the assault. He recovered the tire irons at the time of the arrest and the next day, in Criminal Court, was offered money to change his testimony and get rid of the weapons. A meeting was set up for that evening. The officer met with the two men, with minifon equipment, and the offer was made again (R-57-58). The defendants were not arrested on the bribery charge until after indictment, which was handed down on July 14, 1965, a year and a half later.

In the meantime, on January 11, 1965, Piccirillo and Labello were sentenced for the Attempted Assault charges after having pleaded guilty. They, thereafter, on March 18, 1965, while serving their jail sentences, were both called into the Grand Jury, were given immunity and were interrogated about the circumstances of the assault in an obvious attempt to learn who was behind the whole scheme, an attempt which proved fruitless. On March 22, 1965, Officer Sewell testified to the attempted bribery and on

July 14, 1965, the Attempted Bribery Indictment was handed down.

Both men pleaded guilty on August 9, 1965 but the pleas were later withdrawn on November 10, 1965.

A motion was made for an inspection of the Grand Jury minutes and for the dismissal of the indictment on the ground that the immunity afforded them in the Grand Jury during the investigation into the assault also extended to the Bribery charge, but their application was denied on December 13, 1965, by Hon. David L. Malbin, who also wrote an opinion. The Court held that the testimony given by defendants "could not be construed in the slightest degree that it offered a lead or suspicion" to the Bribery charge. That issue, and the scope of the immunity given was the issue on appeal.

After their applications were denied, the defendants pleaded guilty on December 17, 1965, during trial, and were sentenced as aforesaid on January 19, 1966.

POINT I

A state grant of immunity to a witness before a Grand Jury need only afford protection against the use of any compelled testimony or the fruits thereof to supplant the federal privilege against self-incrimination.

Petitioner argues that as a matter of federal constitutional law when a State seeks to supplant the privilege of a witness who refuses to answer questions which may incriminate himself, it must do so by virtue of an immunity statute which grants the witness what is generally known as testimonial and transactional immunity.

Petitioner relies greatly on the often discussed decision in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892) as well as the other authorities and arguments alluded to.

If the federal constitution requires, as a minimum, that the immunity required is only a prohibition against use of the compelled testimony or any leads or fruits arising therefrom, then, unless as a matter of fact there is such a prohibited use in this case, as long as other evidence supported the Attempted Bribery charge, the present indictment was not barred. The interpretation of the second portion of the New York Immunity Statute, the portion affording transactional protection, is purely a matter of State construction of a State statute, involving no constitutional issues.

If, on the other hand, the United States Constitution requires that all Immunity Statutes provide testimonial and transactional immunity, then the question of the scope of the transactional portion is also a constitutional question to be determined by a uniform constitutional standard.

It is respondents position that *Counselman* is inapplicable to the case at bar and it has been or should be overruled. Respondent argues that this Court should hold that the Federal Constitution only requires that a witness be given immunity against the use of his compelled testimony or any leads or fruits arising therefrom and that if the States wish to provide greater protection, that protection is based on State considerations rather than on constitutional requirements.

The recent and celebrated case of *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52 (1964) should be viewed as fully deciding this question and squarely controling this case.

After reviewing the development in the law from the English cases until the time of *Murphy*, Mr. Justice Goldberg, writing for the Court, announced the Court's holding:

> ". . . we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuiting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." *Murphy* v. *Waterfront Commission of New York*, *supra*, at 79.

Then at footnote 18, the rationale of the holding became even clearer when it was said that once a defendant demonstrated that he had been compelled to testify after a State grant of immunity to matters related to a federal prosecution, the burden was then on the United States to show that evidence arose from sources independent of the State proceedings.

Thus, it was apparent that what was intended was a rule of constitutional law that essentially placed a witness in the same position he would have been in had he still been able to plead his privilege, or had he not testified at all. The only rule that could accomplish this end was a rule prohibiting use of the testimony or fruits but allowing for prosecutions based on independent, untainted evidence. The witness would be in no worse position than had he been allowed to plead his privilege because he would have always been subject to prosecution based on other evidence anyway.

Since this Court made the Fifth Amendment applicable to the States in *Malloy* v. *Hogan*, 378 U.S. 1 (1964) and it specifically overruled the dual sovereignties concept of *Counselman* in the *Murphy* case, the concept that each jurisdiction was totally independent and that a witness before one jurisdiction could not refuse to answer a question on the grounds that he could incriminate himself in a second jurisdiction, the minimum immunity requirements must be applied universally.

Mr. Justice Harlan, in a concurring opinion, joined in by Mr. Justice Stewart, in *Stevens* v. *Marks*, 383 U.S. 234 (1966) reiterated that *Murphy* abolished the two sovereignties concept and it was also recognized that an expansive reading of the privilege could have a more profound impact than in the days of *Counselman*.

In addition, since the *Murphy* case, Circuit Judge Friendly, writing for the United States Court of Appeals for the Second Circuit, in *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York,* F. 2d (decided April 3, 1970), took the view that generally it has been thought that this Court has overruled *Counselman*, sub silentio, in *Murphy* and that use and fruits immunity was the minimum standard required by the constitution.

This was also the position taken by the New Jersey Supreme Court in *Zicarelli v. New Jersey State Commission of Investigation*, 55 N.J. 249 (1970) and as pointed out by Circuit Judge Friendly in *Uniformed Sanitation Men Association, Inc.*, it is the view that Congress has apparently taken when it passed Title II of the Organized Crime Control Act.

The same view was held by the United States District Court for the Southern District of New York in *United States ex rel. Ciffo v. McClosky*, 273 F. Supp. 604 (S.D.N.Y. 1967) and *Application of Longo*, 280 F. Supp. 185 (S.D.N.Y. 1967).

The discarding of the dual sovereignty concept, the decision in *Malloy making* the Fifth Amendment applicable to the States and the practical effect to be considered which would attend each of the different rules that could be applied, weaken the argument for the continued validity of *Counselman* and necessitate a rule such as respondent argues for.

The statement in *Counselman* that absolute transactional immunity was required to supplant the privilege was, as pointed out in *Murphy* and *Zicarelli*, dicta and not neces-

sary to the decision. Of greater importance, since the dual sovereignty concept was valid, the impact of *Counselman* was very limited. The Fifth Amendment did not apply to the States and regardless of what type of immunity the State gave, the federal government was not in any way bound. Even if no immunity were afforded at all, the federal privilege could not be pleaded in a state proceeding nor could the state privilege be pleaded federally. *Jack* v. *Kansas*, 199 U.S. 372, 381-382 (1905); *Hale* v. *Henkel*, 201 U.S. 43 (1906); *United States* v. *Murdock*, 284 U.S. 141 (1931).

Today, where the Fifth Amendment is available in a State proceeding and the concept of two sovereignties no longer exists, the basis upon which *Counselman* rested is no longer valid. Hence, the holding in that case must again be scrutinized. As pointed out in *Malloy*, this Court has never refrained from re-assessing old ideas and even discarding them when no longer valid.

This, of course, was done in *Murphy* and the new rule was announced.

The practical considerations are also vital and dictate a use plus fruits requirement only.

In the concurring opinion by Mr. Justice White, joined in by Mr. Justice Stewart, in the *Murphy* case, it was dramatically pointed out that if the Court adopted a transactional rule as a constitutional requirement, it would invalidate the immunity statutes of all 50 States because since the States were powerless to grant federal transactional immunity even if the Constitution required it, a witness could never be made to give up his federal privilege of self-incrimination. Serious in-roads into law enforcement and the administration of justice would be made.

The justice said that the Court was not adopting such a rule and the following idea was put forth:

> "In reaching its result the Court does not accept the far reaching and in my view wholly unnecessary constitutional principle that the privilege requires not only complete protection against any use of compelled testimony in any manner in other jurisdictions, but also *absolute immunity* in these jurisdictions *from any prosecution pertaining to any of* the testimony given." (Emphasis supplied) *Murphy* v. *Waterfront Commission of New York*, *supra*, at 92-93.

The opinion added at page 93 that if the Court had adopted a "Counselman" rule of absolute transactional immunity it would:

> ". . . invalidate the immunity statutes of the 50 States since the States are without authority to confer immunity from federal prosecutions, and would thereby cut deeply and significantly into traditional and important areas of state authority and responsibility in our federal system. It would not only require widespread federal immunization from prosecution in federal investigatory proceedings of persons who violate state criminal laws, regardless of the wishes or needs of local law enforcement officials, but would also deny the States the power to obtain information necessary for state law enforcement and state legislation."

It should also be noted, that the concurring opinion, in pointing out the hardships that a transactional rule would entail, assumes that the States do not have the power to grant federal transactional immunity so that the continued availability to a witness of his federal privilege is the factor which destroys the State immunity statutes. But even looking at the

other possibility, if it could be held that a State transactional grant can bind the federal government transactionally, the effect is even more disastrous as far as effective law enforcement is concerned.

Thus, if in an obscure State investigation, unknown to the Federal authorities, a witness was called to testify, given immunity and responsively testified in part to transactions which might constitute or relate to major, serious, federal crimes, he could be forever sterilized against any type of federal prosecution for those crimes to which the testimony related. In such a way one government in a seemingly innocuous or unimportant proceeding could destroy, unknowingly, the power of the other government from ever taking action with respect to a particular individual.

The not impossible example comes to mind that if the United States, after a lengthy, protracted and expensive investigation had completed its case against an important criminal figure and was about to arrest or indict, but a State agency, unmindful of the contemplated federal action, had given the witness immunity, all of the effort of the United States could be made to count for naught.

In such a situation the only loser would be the public.

A Sovereign should be allowed to make its own choice whether it is willing to give up subsequent prosecution of an individual in exchange for the information sought and it is wrong to permit one jurisdiction to make that determination for another. That would be the result if complete immunity were required and it was held that one jurisdiction could bind the other.

Such a result would be disastrous to the federal system which is based upon the idea that each jurisdiction should

have the freedom to operate within its own sphere. A witness could thus achieve complete amnesty by admitting to crimes which were committed in a jurisdiction other than the one in which he testified and incentive would be created for corruption in the lower levels of a jurisdiction's administration. *Comment: In re Koota: The Scope of Immunity Statutes*, 61 N.W.L. Rev. 654, 660-661 (1966-1967).

It is absolutely essential, from the standpoint of not only the rights of witnesses, but from the point of view of effective law enforcement and the interplay of State-federal jurisdiction that the rule enunciated in *Murphy* be re-affirmed.

Such a rule is fair because it is truly co-extensive with the protection afforded by the constitution and leaves the witness in the same position as if he had never been compelled to testify.

New York, in giving this petitioner transactional immunity, gave him more than was necessary and its interpretation of its own statute was a matter of State statutory construction only.

Petitioner impressively cites statutes in each of the 50 states to argue that all of the States grant transactional immunity. This is done no doubt to suggest to this Court that if the States view their constitutions, which are generally similar to the federal constitution, to require transactional immunity, this Court should be persuaded to hold similarly.

Prior to *Counselman*, most states had only use immunity statutes, *Comment: Self-Incrimination in the Modern American Law*, 5 Temple L.Q. 368 (1930-31); *Comment: Federalism and the Fifth: Configurations of Grants of Im-*

munity, 12 U.C.L.A. L. Rev. 561 (1964-65), as did the federal government inasmuch as it was a use statute only, not even extending to leads or fruits, which was overturned. The States, prior to *Counselman* had viewed such use statutes as being constitutional. *State* v. *Quarles*, 13 Ark. 307 (1853); *Ex Parte Cohen*, 104 Cal. 524 (1894); *Kneeland* v. *State*, 62 Ga. 359 (1879); *Wilkins* v. *Malone*, 14 Ind. 153 (1860); *Ex Parte Buskett*, 106 Mo. 602 (1891); overruled sub silentio, *Ex Parte Carter*, 166 Mo. 604 (1902); *People ex rel Hackley* v. *Kelly*, 24 N.Y. 74, rev'd *People ex rel Lewisohn* v. *O'Brien*, 176 N.Y. 253 (1903); *LaFontaine* v. *Southern Underwriters*, 83 N.C. 133, overruled sub silentio *Smith* v. *Smith*, 115 N.C. 386, 387-88 (1895); *Bedgood* v. *State*, 115 Ind. 275 (1888); *Ex Parte Rowe*, 7 Cal. 184 (1857); *Higdon, Heard*, 14 Ga. 255 (1853).

It was only because of the absolute immunity statement in *Counselman* and not because of any deep-seated feeling on the part of the States that the statutes were thus changed and the uniformity of State statutory law as shown in petitioner's appendix B to his brief came about. *Ex Parte Cohen*, 104 Cal. 524, 529-530 (1894); Comment: *Federalization and the Fifth: Configurations of Grants of Immunity*, 12 U.C.L.A. L. Rev. 561 (1964-65); Comment: *State Immunity Statutes in Constitutional Perspective*, Duke L.J. Vol. 1968 p. 311, 322.

There can be little doubt that if the statutes were enacted pursuant to *Counselman* they cannot be relied on to suggest that the rule in *Counselman* still be adhered to for that would truly be putting the cart before the horse. If the rationale for *Counselman* is no longer appropriate than the statutes are to be considered as nothing more than State action providing to a witness more than is constitutionally

required. The compilation of State statutes also do not support petitioner's argument for the further reason that as can be seen, within each State, different statutes provide different types of immunity so that the legislatures were not always in agreement regarding what was required. The statutes of each State are also categorized in 8 *Wigmore, Evidence*, § 2281 fn. 11, which also indicates that there are even jurisdictions today, although in Canada, that do not grant transactional immunity in any event.

In *Zicarelli* v. *New Jersey State Commission of Investigation*, 55 N.J. 249, 261 A. 2d 129 (1970), the New Jersey Supreme Court upheld a New Jersey Statute, enacted after *Murphy*, which provided a witness with only use plus fruits immunity. N.J.S.A. 52:9m-17(b). The Court held that the constitution required the statute to go no further and it pointed out that the narrower ground for the *Counselman* holding was that the federal immunity statute in that case did not even prohibit using the compelled testimony to obtain leads. The more broad statement was not necessary to the decision and, the Court pointed out, it was made at a time when the Fifth Amendment was not applicable to the States. Of course, since *Malloy*, the Amendment is applicable and as the Court said:

> "In that setting, the scope of the required immunity assumes new significance. If the immunity must protect against prosecution with respect to any offense, both state and federal, to which the testimony relates, the states would be unable to compel testimony no matter how urgent the public need since they could not immunize a witness from federal prosecution." *Zicarelli* v. *New Jersey State Commission, supra*, at 138.

It was held that the most acceptable solution was to protect the witness against the use of his testimony by all jurisdiction but leave government free to prosecute on the basis of independent evidence.

It was also the view that the *Murphy* case had clearly changed the rule pronounced in *Counselman* insofar as it went further than actually was necessary to decide that case.

The Court said at page 140:

> *We are satisfied that the Fifth Amendment does not require immunity from prosecution.* An immunity of that breadth exceeds the protection the Fifth Amendment accords. More importantly, to find that demand in the Fifth Amendment would in practical terms deny state government access to facts it must have to meet its duty to secure the well-being of all the citizens. *We heretofore deemed the Constitution to require immunity aganist use of testimony rather than immunity from prosecution,* see *State* v. *Spindel,* 24 N.J. 395, 404-405, 132 A. 2d 291 (1957), and recently our Legislature, in adopting the Model State Witness-Immunity Act, substituted an immunity from use for an immunity from prosecution. See *In re Addonizio,* 53 N.J. 107, 114-115, 248 A. 2d 531 (1968).
>
> There is a difference in that *Murphy* dealt with a federal-state setting whereas we are here dealing with the claim that our statute does not protect a witness from prosecution under our state law. But the question in both is the same, *i. e.,* what immunity the Fifth Amendment requires in exchange for compulsion to answer. The values involved are the same. We see no sensible basis for a different answer. *Gardner* v. *Broderick* treated the issue as one and the same, citing both *Counselman* and *Murphy. Murphy* held and *Gardner*

repeated that the Fifth Amendment requires protection only from the use of the compelled testimony and the leads it furnishes, and that protection our statute expressly provides. *See United States ex rel. Ciffo v. McCloskey*, 273 F. Supp. 604 (S.D.N.Y.); *Application of Longo*, 280 F. Supp. 185 (S.D.N.Y. 1967). (Emphasis added)

In California, the same view was taken regarding the holding in *Murphy* as was taken in New York and New Jersey. In *Byers v. Justice Court for Ukiah Judicial District*, 80 Cal. Reptr. 553 (1969), cert. granted, *Byers v. California*, 38 U.S.L.W. 3405 (April 21, 1970) the Supreme Court held that *Murphy* and *Gardner v. Broderick*, 392 U.S. 273 (1968), stood for the proposition that complete immunity such as was discussed in *Counselman* was not required by the Constitution but that answers could be compelled as long as there was immunity from federal and state use of the testimony or its fruits.

The Court considered a section of the Vehicle Code, known as a "hit-and-run" statute requiring the disclosure of certain information, which might otherwise be privileged, in certain automobile accident situations. It held that the disclosures could be compelled but that the use—fruits protection was available to the person giving the information. In discussing *Murphy* and *Gardner*, the Court said at page 561:

> "This rule is the logical corollary of the rule that when information is the product of an involuntary disclosure secured in violation of the privilege the person disclosing the information is merely protected from prosecution on the basis of such information and the fruits thereof and not from any and all prosecution for offenses to which the information relates.

(E.g., Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616, 17 L.Ed.2d 562; Miranda v. Arizona, 384 U.S. 436, 479 [majority opinion], 500, 522 [dissenting opinions], 86 S.Ct. 1602, 16 L.Ed.2d 694.)

Accordingly, if the disclosures compelled by section 20002 of the Vehicle Code and the fruits of such disclosures may not be used in a criminal prosecution relating to the accident, the requirements of the privilege against self-incrimination are met."

This was also the view taken regarding *Murphy* by Professor Mansfield in *The Albertson Case: Conflict Between The Privilege Against Self-Incrimination and the Government's Need For Information*, 1966 Sup. Ct. Review, 103, 164 (1966).

The Supreme Judicial Court of Maine joined New York, New Jersey and California in interpreting *Murphy* in *State v. Castonguay*, 240 A. 2d 747, 753 (1968) when it held that Maine, which had the same self-incrimination clause in its constitution as the federal Constitution, could not use statements which the defendant had been compelled to make in the federal courts during sentencing in a previous federal prosecution.

The Court said:

"Our case comes within the principle stated above. In the Federal Court, the defendant was 'compelled to give testimony' which might be incriminating under State law. The State may not use the compelled disclosure or its fruits. . . . In our view, indeed, he was entitled to answer the inquiries of the Federal Judge safe from harm in the State Court as a result thereof." *State* v. *Castonguay, supra,* at p. 753.

The Kansas Supreme Court agreed in dicta in *State ex rel. Londerholm* v. *American Oil Co.*, 202 Kan. 185, 190

(1968) and this Court again in *Miranda v. Arizona*, 384 U.S. 436, 460 (1966), recognized that our system of American criminal justice was only aimed at requiring the government to secure evidence by virtue of its own independent labors rather than by compelling it from the witness' own mouth. This purpose would only necessitate a use fruits prohibition.

If *Malloy* had not made the federal privilege applicable to the States, it could be argued that *Murphy* and *Counselman* were reconcilable in that *Counselman* set forth what was federally required under the Fifth Amendment but that *Murphy* described what would be the minimum necessary under the Fourteenth Amendment for the States to provide. But *Malloy* did come about and it is desirable and even imperative in consideration of the orderly administration of justice and federal state relationships, that the same constitutional principles be applied to what is essentially the same language in the Federal and most State Constitutions and as incorporated in the concept of due process. *Comment: Federalism and the Fifth: Configurations of Grants of Immunity*, *supra*, at 577.

POINT II

The evidence petitioner gave in the Grand Jury was not used against him. The indictment subsequently found did not relate to any thing or transaction he testified to.

Petitioner argues that his answers in the Grand Jury were used against him in part to secure the within indictment and also that the indictment concerned a "thing" or "transaction" as mentioned in the New York Immunity

Statute. If the New York Court of Appeals was wrong and the indictment did fall within the meaning of the words "thing" or "transaction" used in the immunity statute, it was barred if this court holds that transactional immunity is required by the Federal Constitution.

In discussing the first issue, whether his evidence was actually used, petitioner makes the argument that the use of his testimony consisted in providing the Grand Jury with, from his own mouth, testimony showing the background of and motive for the Attempted Bribery charge. This argument is advanced even though petitioner acknowledges that motive is not an element of the crime charged or of any crime under New York Law. (Petitioner's Brief, p. 15, fn. 6).

The record shows that petitioner's testimony did not relate to the Attempted Bribery charge in any way and, moreover, the testimony of Patrolman Sewell was complete in and of itself. It must be remembered that Sewell not only gave evidence about the bribe offer but he was also an eyewitness to the assault. He testified that he saw the assault occur, that he chased and caught the assailants and that they both admitted to him that they were hired to do in Jack Graham, the victim (p-55). No more evidence of background or motive was needed, and, in fact, when the trial began, Patrolman Sewell was the only prosecution witness that testified up until petitioner changed his plea to guilty (R72-91, 92-99). The evidence given before the Grand Jury by Patrolman Sewell covered every element of the crime charged, was sufficient in law to support the indictment and it could have supported a conviction after trial, had the plea not been interposed.

Any statements made in the Grand Jury by petitioner were cumulative at best, did not relate to the Attempted Bribery and added nothing to the People's case.

The New York Court of Appeals took the same view in its opinion herein wherein it concluded that:

> "There is no doubt that the police officer's testimony here was based on his personal knowledge as the recipient of the bribe offer and that the Grand Jury's indictment was completely based on that testimony. Nothing appellants said indicated that a bribery attempt had occurred. Whatever evidence might have been revealed by the appellants' testimony was wholly insubstantial. Therefore, even if it be assumed that appellants' testimony was related to the bribery, the indictment was not the product of that testimony. Consequently, appellants' Fifth Amendment rights were in no way violated by this indictment." (R-118)

The Grand Jury heard a great deal of questions asked not only of petitioner, but of his cohort, Anthony Labello, and the entire inquiry was focused not on a bribe incident, about which the Grand Jury then knew nothing, but it was an investigation which had as its sole aim, the unmasking of the people who paid for and directed the assault of Mr. Graham. The possible scandal in connection with the New York City Housing Authority was the real object of the Grand Jury's efforts (R-101-102), and they were not at all concerned with prosecuting this petitioner any further regarding the assault. That is obvious because they were willing to clothe him with immunity.

After the questioning ended, a few days later, when Patrolman Sewell testified for the first time, it is even

questionable if the Grand Jury could even recall the mention of the "tire iron" by Piccirillo and very brief acknowledgment that the assault had been committed. That testimony occurred at the beginning of lengthy inquiry into the more important areas the jury was concerned about and when that ended and a few days later Patrolman Sewell gave evidence, complete in itself and containing all the background and motive petitioner argues he supplied, it is apparent that the New York Court of Appeals was correct in deciding that no use had been made of petitioner's answers.

It seems to respondent that what happened here in this regard was more innocuous that the more common practice in some federal jurisdictions of subpoenaeing a potential defendant to a Grand Jury when that jury has already heard evidence against him, the only possible restriction being that he may have to be advised of his rights. Although such a practice would be illegal in New York, *People* v. *Laino*, 10 N.Y. 2d 161, (1961) it has been continually held that once the potential defendant is aware of his rights, it is his misfortune if he thereafter incriminates himself, even though he was a target of the investigation. *United States* v. *Irwin*, 354 F. 2d 192 (2nd Cir. 1965); *United States* v. *Winter*, 348 F. 2d 204 (2nd Cir. 1965); *United States* v. *Cleary*, 265 F. 2d 459 (2nd Cir. 1959); *Cardarella* v. *United States*, 375 F. 2d 222 (8th Cir. 1967); *United States* v. *Leighton*, 265 F. Supp. 27 (S.D.N.Y. 1967).

Some of the authorities also took the view that although the defendant's rights had not been violated, even if they had, the giving of no testimony of substance would make any happening non-prejudicial and the indictment would not have to be dismissed. *United States* v. *Irwin*, *supra*;

Cardarella v. United States, supra; United States v. Leighton, supra.

Thus, petitioner's argument that the mere violation of the right should in and of itself, even absent prejudice, lead to a dismissal of the indictment is not supported in law. See also *Chapman v. California*, 386 U.S. 18 (1967); *Coleman v. Alabama*, U.S. , 38 U.S.L.W. 4535 (decided June 22, 1970).

The issue of whether petitioner's testimony was used against him, like the issue of whether the Attempted Bribery prosecution arose out of a "transaction, matter or thing" concerning which he gave testimony are essentially questions of fact. The latter issue was also resolved against petitioner and in a later opinion by the New York Court of Appeals in *Matter of Gold v. Menna*, 25 N.Y. 2d 475, (1969) the holding in this case was further clarified in a footnote, when the Court, after overruling this case insofar as it had held that the New York statute provided only testimonial immunity, said:

> "This does not, however, mean that LaBello was incorrectly decided. On the contrary, the decision actually rested on the fact that the defendants in that case, according to the majority view, were not prosecuted — in the language of the statute — 'for or on account of any transaction, matter or thing concerning which * * * [they] gave answer or produced evidence' (former Penal Law, S. 2447, now Code Crim. Pro., S. 619-c, subd. 2); in other words, they gave no testimony which related or pertained to the offense for which they were prosecuted and of which they were convicted." *Matter of Gold v. Menna, supra* at 481 (Appendix to Petitioner's Brief, A-4, Fn. 1).

The Court below examined the minutes of the Grand Jury and saw that the Assistant District Attorney told the petitioner that the Grand Jury was investigating the assault committed on Jack Graham and all conspiracies connected with the assault (R 32-33). Petitioner was also told that he could not be prosecuted on account of any answers they might give (R 33-34). Extensive interrogation was had and the petitioner gave answers, although apparently not satisfactory, concerning the circumstances of the assault and the events leading up to it (R 34-53). No mention of the attempted bribe was made and the weapons were discussed only insofar as the witness was asked to describe the assault itself, where the weapons were obtained and questions were asked of a similar nature. No mention of the name of Patrolman Sewell, the officer whom the petitioner offered the bribe to was made and the circumstances of the arrest or the arraignment the next day, when the bribe was offered, were not gone into in the slightest. Petitioner's contention is that because one of the things he offered Sewell money for was to lose the weapon and since the weapon was mentioned during the bribe offer, although in a totally different context, the mere fact that the weapons were mentioned or described makes the subsequent indictment invalid because the weapon was a "thing" testified to in the Grand Jury.

Such an argument stretches logic to the breaking point. The Attempted Bribery indictment was not based on the weapon and its essential elements did not depend in the slightest upon any evidence given by either defendant. Had petitioner admitted ownership of the weapons and then been prosecuted on a weapons charge or for an illegal possession violation then truly he would have been subjected to prosecution because of things revealed in his testimony.

Here, all the essential elements of the crime were included in the testimony of the officer upon whose evidence the indictment was based. The fact that petitioner possessed weapons with which he assaulted Jack Graham was nothing new but merely cumulative. This was already known, the petitioner had been indicted and had already pleaded guilty. No mention of the weapon would have to be made to sustain a bribery prosecution. Nothing was disclosed and it is the disclosure of facts not otherwise known or available which is the entire purpose behind calling witnesses to a Grand Jury and giving them immunity (*People ex rel. Hunt* v. *Fine*, 132 App. Div. 496, affd. 196 N. Y. 520 (1909); *People* v. *Cahill*, 126 App. Div. 391 affd. 193 N.Y. 232 (1908); *United States* v. *Onassis*, 125 F. Supp. 190 (D.C.D.C. 1954)). The witness only gets immunity regarding those matters actually testified to and not all things to which strained logic may lead (*People* v. *Fine*) 178 Misc. 1010 (S.C't. Orange Co. 1949). Broader interpretations than necessary to effectuate the purposes of immunity statutes should not be indulged in (*United States* v. *Nicholas*), 125 F. Supp. 214 (D.C.D.C. 1954).

The procedure followed by respondent and the Grand Jury in this case even in New York is not unusual in a proper case

> "The condemnation that has been asserted against the practice of calling the accused as a witness in the very proceeding in which the charge against him is being investigated (*People* v. *Ferola*, 215 N.Y. 285), if it has any relation to cases where immunity is intended to be and is granted, would not seem to be applicable to an inquiry directed in good faith towards establishing the commission of crimes by others." *People* v. *Reiss*, 255 App. Div. 509, 516, affirmed 280 N.Y. 539.)

The testimony of petitioner was not incriminatory nor did it reveal anything not previously known. The questions asked and the responses made were not reasonably connected with nor did they refer to the Attempted Bribery charge. The rationale of Mr. Justice Malbin's decision denying the motion below was a correct appreciation of the applicable law that under the facts of this case petitioner was not immune from the Attempted Bribery prosecution.

This would be true regardless of whether petitioner was entitled to transactional immunity as a constitutional principle or if he merely received it under State law. That is what petitioner received anyway under the laws of New York and that is what he was told he was getting (R-33-34). In fact, no impermissible use was made of his testimony and the Attempted Bribery prosecution did not emanate from his Grand Jury appearance.

If transactional immunity is not constitutionally required, but the minimum protection necessary is to be against use and fruits, still, this judgment should be affirmed because as we have argued, no such use was made. Not only did the New York Court of Appeals agree, but this view of the facts was taken initially by the lower court Justice (A-65-66) when it held:

> "The testimony furnished . . . could not be construed in the slightest degree that it offered a lead or suspicion that their testimony was related to the allegations set forth in this indictment" (R-66).

In that view, the question becomes nothing more than the application of the facts to a State statute which goes further than the Constitution requires and even if transactional immunity is necessary, the Attempted Bribery prosecution was still factually not within the scope of the immunity.

POINT III

The petitioner's right to counsel was not diluted. Even if technical interference existed it has no application to this case.

When Mr. Piccirillo appeared before the Grand Jury of Kings County he was told that the Grand Jury was investigating the assault on Jack Graham and any conspiracies in connection therewith. (R-32-33). The meaning of statutory immunity was explained and the prosecutor said he would ask the Grand Jury to vote him immunity. He also said that after it was granted the witness could not be prosecuted in any crimes that his answers connected him with (R-33).

The petitioner left the room and upon his return was informed by the foreman and prosecutor that he had been granted immunity (R-33). Then after saying that he would answer the question he said "I'd just like to speak to my lawyer." The prosecutor replied:

> "Under these circumstances you are not a defendant, you are a witness, you have been given immunity. That means you cannot be prosecuted. Your rights are fully protected and there is no reason for your conferring with your attorney, do you understand that?"

Petitioner replied: "yes" (R-34) and thereafter he was questioned at length (R-34-53). No mention of the attempted bribe was made except that the tire iron was mentioned in that it was the weapon he was paid to use on the victim of the assault.

Respondent will be the first one to agree with petitioner that the right to counsel is extremely important and, de-

pending upon the circumstances, a witness in a grand jury should generally be permitted to consult with counsel who is presumably in the hallway unless it will unduly disrupt the proceedings.

Respondent submits however, that this principle does not apply to the case at bar. If the witness had been ultimately prosecuted for perjury or contempt it could be argued that had he been allowed to consult counsel he could have been advised that a proposed answer or course of action might be perjurious or contemptuous. It could then be said that counsel could have played a significant role and that the witness' desire to consult could be for other purposes than to seek aid in how to answer the question is an improper manner.

Where, as here, however, the prosecution is for a substantive crime not then under investigation and not fairly connected with the testimony, the violation of the right to counsel, if any, is irrelevant. It could make no difference since petitioner could not have asked his lawyer about things which were apart from the proceedings at that time.

In addition, the record shows that the request was not regarded as important by petitioner himself and the entire pattern of questions and answers shows that no real assistance was necessary or could have been given. When the only aid sought would or could have been in the answering of difficult or embarrassing questions, or where the attorney's advice is sought only for strategic purposes, the denial of the request should not be considered to be a denial of constitutional rights. *People* v. *Ianiello*, 21 N.Y. 2d 418, 426 (1968).

In the *Ianiello* case the New York Court of Appeals held that while the right to counsel was vital in a free society it

could not be manipulated for the only purpose of strategy or seeking aid in answering embarassing questions. In such a situation, where no harm resulted, the Court would not allow the privilege to be used as a shield and, even if it were violated, a dismissal of the indictment was not required.

In this case, the Court considered the question of a possible violation of Piccirillo's right to counsel and held:

> "Since Piccirillo's answers did not form the basis of the present indictment, his claim that his constitutional right to counsel was violated because he was not permitted to confer with his attorney is without merit. No prejudice did or could result for the attorney could have done nothing more for Piccirillo than to assure that he was given the immunity which in fact he did receive. Piccirillo's situation is to be distinguished from that of a witness who, denied permission to confer with his counsel, refuses to answer and is held in contempt. Such a witness might properly claim that, had he been given an opportunity to obtain advice from his lawyer, he would undoubtedly have testified, and thereby been spared a prosecution on a contempt charge." *People* v. *LaBello, supra* at 606 (R-119)

The petitioner goes even further than merely arguing that he should have been allowed to speak to his lawyer but he also contends that his attorney should have been permitted in the room.

The law always has been that a witness before a Grand Jury or other similar investigative body, does not have the right to have an attorney actually in the room, *Anonymous* v. *Baker*, 360 U.S. 287, 292 (1959); *Matter of Groban*, 352 U.S. 330, 333 (1957); *United States* v. *Scully*, 225 F. 2d

113, 115-116 (2nd Cir. 1955) cert. den. 350 U.S. 897; *Matter of Black*, 47 F. 2d 542, 543 (2nd Cir. 1931); *Battaglia* v. *United States*, 349 F. 2d 556, 560 (9th Cir. 1965); *People* v. *Ianniello, supra*; although the right to consult with his attorney who may be outside the chamber is really not in serious dispute. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478, 486 (1964); *United States* v. *Leighton, supra*, at 38; *United States* v. *Kane*, 243 F. Supp. 746 (S.D.N.Y. 1965); *United States* v. *Grunewald*, 164 F. Supp. 640 (S.D.N.Y. 1958; *People* v. *Ianiello, supra*; *People* v. *DeFeo*, 284 App. Div. 622, 627, rev'd on other grounds 308 N.Y. 595 (1954).

Even Mr. Justice Black who dissented in *In re Groban, supra*, in an opinion joined in by Chief Justice Warren and Justices Douglas and Brennan, indicated that he would have joined the majority had the case involved the traditional 12 to 23 member Grand Jury, where there was less danger of abuse than in the situation actually before the Court, one of a single inquisitor.

Mr. Justice Black said that the need for counsel in the room was not as great where grand jurors were concerned:

> "They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call

on the grand jurors if need be for their normally unbiased testimony as to what occurred before them." *In re Groban, supra* at 347.

It would seem that the wisdom of these rules is still valid because if counsel were permitted in the Grand Jury room itself, constant objections to questions on the ground of relevancy, form or other privilege and constant requests for rulings from the Court sitting would unduly lengthen the Grand Jury's proceedings. There could be a serious roadblock to legitimate inquiry implanted by stalling or delaying tactics and since a Grand Jury never ultimately determines innocence or guilt and the sufficiency of its indictments are usually open to judicial scrutiny anyway, no harm is inherent in adhering to the prevailing rules.

The secrecy of the Grand Jury's proceedings could be seriously impaired because oftentimes the same attorney represents more than one witness during a particular investigation. The proceedings would essentially be changed in character from proceedings basically investigatory in nature to an adversary situation. This would pervert the historical purpose of the Grand Jury as a finder of fact and turn its proceedings into a pre-trial hearing. That sentiment was expressed in *Stallings* v. *State*, 154 Conn. 272 (1966), where it was thought that allowing counsel into the room would turn the Grand Jury's proceedings into nothing more than a preliminary trial and the dangers were forcefully and clearly noted by Chief Judge Fee in *United States* v. *Smythe*, 104 F. Supp. 283, 290-291 (N.D. Cal. 1952) and by District Judge Kirkpatrick in *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E.D. Pa. 1933).

Petitioner argues that the rationale of recent decisions of this Court in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961);

White v. *Maryland*, 384 U.S. 436 (1966); *Miranda* v. *Arizona, supra; United States* v. *Wade*, 388 U.S. 218 (1967) and *Coleman* v. *Alabama*, U.S. , 38 U.S.L.W. 4534 (Decided June 22, 1970) require the extension of the right to counsel to the Grand Jury Room.

Analysis of those authorities reveals that their holdings do not affect the long standing practice of excluding the attorney from the room itself. All of the Courts that have considered the problem have concluded that because the Grand Jury does not involve a situation where oppressive custodial interrogation in a police dominated atmosphere is present, the right to counsel should not be further extended to that situation. *United States* v. *Di Michele*, 375 F. 2d 959 (3rd Cir. 1967); *United States* v. *Goldenberg*, 276 F. Supp. 898, 900 (S.D.N.Y. 1967); *United States* v. *Wolfson*, 282 F. Supp. 772 (S.D.N.Y. 1967); *State* v. *Nelson*, 202 So. 2d 232 (Fla. 1968).

Judge Tenney pointed out in *United States* v. *Goldenberg*, *supra* at 900 that:

> "Neither *Escobedo* or *Miranda* is authority for the proposition that a witness before a Grand Jury is entitled to have counsel physically present with him in the Grand Jury room".

This Court also recognized in *Miranda* itself that the factors present in the police station were different than would attend other types of less overbearing inquiry.

> "As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other *official investigations*, where there are impartial observers to guard against intimidation or trickery". (Emphasis added) *Miranda* v. *Arizona, supra* at 461.

Contrary to the Alabama preliminary hearing in the *Coleman* case, Grand Jury proceedings are not a "critical Stage" of the prosecution because potential substantial prejudice to a defendant's rights does not exist. Grand Jury proceedings are not a confrontation, *Costello* v. *United States*, 350 U.S. 463 (1956); *United States* v. *Smythe*, *supra*, and since they only determine whether a man should be made to answer criminal charges, the prosecutor's case against him does not in any way benefit from what occurs in the Grand Jury. The proceeding only examines evidence already secured and does not result in the addition of anything new or the waiver or relinquishment of any rights or course of action otherwise available to a witness or defendant.

In the case at bar, since, as the New York Court of Appeals indicated, no prejudice resulted to petitioner because his answers were not the basis of the Attempted Bribery Indictment, it would have made little difference if the attorney was outside of or in the Grand Jury room with appellant. In either event, it would not have mattered.

This Court has held that even if error of constitutional magnitude is present, if no harm results, the error can be disregarded. *Chapman* v. *California*, 386 U.S. 18 (1967). In a recent case, *Coleman* v. *Alabama*, ___ U.S. ___; 38 U.S.L.W. 4535 (decided June 22, 1970), where the petitioner had been deprived of his right to counsel at a preliminary hearing, this Court decided that although it was a critical stage of the proceedings, still, a remand was appropriate to determine if there had been any prejudice. The law of Alabama prevented the use of anything said at the hearing without counsel and if no harm was apparent, the judgment would not have to be disturbed. *Chapman* was reaffirmed.

CONCLUSION

The New York Immunity Statute should be held to require, as a matter of Federal Constitutional Law, protection against the use of any compelled testimony and any fruits or leads arising therefrom. The judgment of the New York Court of Appeals should be affirmed.

Dated: Brooklyn, New York
July, 1970

Respectfully submitted,

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* The writer acknowledges the contribution to this brief made by two law students who could not sign the same due to the fact that they have not been admitted to the bar, Michael R. Klipper of George Washington University National Law Center and Rudolph E. De Meo of Cornell Law School.